STATE OF MICHIGAN

COURT OF APPEALS

JANET PURTY, Plaintiff-Appellant,	UNPUBLISHED August 10, 2001
V	No. 219478 Wayne Circuit Court
ST. JOHN HOSPITAL & MEDICAL CENTER, Defendant-Appellee.	LC No. 97-741280-CK

Before: Doctoroff, P.J., and Murphy and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's entry of summary disposition against her. We affirm.

Plaintiff was diagnosed with breast cancer in July or August 1996 and began a leave of absence from her employment with defendant in August 1996. She underwent surgery and began a series of post-operative therapies (chemotherapy and radiation treatments). Shortly before her leave of absence, plaintiff received a favorable yearly evaluation and a raise in pay.

While absent from the clinic on medical leave, plaintiff was placed on a work improvement plan to correct deficiencies in her performance of billing processes revealed by an internal audit conducted in January 1996. She attempted to return to work to make the necessary improvements, but after working a week in December 1996, she was unable to continue at that pace. She secured a note from her doctor recommending that she work no more than three consecutive days, but found she was also unable to work that schedule due to the debilitating effects of her treatments.

While on leave, plaintiff received a letter from defendant's human resources office notifying her that she was nearing the end of the maximum six-month allowable leave time under defendant's company policy. The letter advised plaintiff that if she did not return to work by March 12, 1997, she would be considered to have voluntarily resigned her position. Plaintiff did not return to work, was terminated by defendant, and subsequently filed the instant claims.

I

On appeal, plaintiff first argues that the trial court erred in granting summary disposition of her claim that defendant retaliated against her after she made a request for accommodation under the Persons with Disabilities Civil Rights Act (PDCRA), MCL 37.1101 *et seq*.[1] This Court reviews a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), this Court considers the affidavits, pleadings, depositions, admissions or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); *Rollert v Dep't of Civil Service*, 228 Mich App 534, 536; 579 NW2d 118 (1998). The party opposing the motion has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The disputed factual issue must be material to the dispositive legal claims. *State Farm Fire & Casualty Co v Johnson*, 187 Mich App 264, 267; 466 NW2d 287 (1990). All reasonable inferences are resolved in the nonmoving party's favor. *Hampton v Waste Mgt of MI, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999).

The anti-retaliation provision of the PDCRA specifically prohibits a defendant from retaliating or discriminating against a plaintiff where the plaintiff has "opposed a violation of this act . . . or made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act." MCL 37.1602(a). To establish a prima facie case of unlawful retaliation, plaintiff must show: (1) that she engaged in a protected activity; (2) that this was known by defendant; (3) that defendant took an employment action adverse to plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. *Mitan v Neiman Marcus*, 240 Mich App 679, 681-682; 613 NW2d 415 (2000). We find no evidence that defendant took any adverse action against plaintiff on the basis of her requested leaves of absence and, therefore, conclude that plaintiff cannot show the required causal connection as a matter of law.

Even assuming that plaintiff's doctor's note was a valid request for accommodation under the PDCRA, defendant did not oppose plaintiff's return to work under the restrictions expressed in the note. The evidence indicates that it was plaintiff's inability to work even three days a week, not defendant's actions, that caused plaintiff to discontinue her modified work schedule. There is no evidence to create a genuine issue of fact as to whether defendant made an adverse employment decision as a result of the alleged request for accommodation. Plaintiff was terminated in March 1997, after she exceeded the six-month maximum leave of absence afforded all defendant's employees, and before she instituted any legal action against defendant. Thus, plaintiff's claim fails.

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[1] Formerly the Handicappers' Civil Rights Act.

II

Plaintiff's next issue involves the trial court's denial of her motion to clarify or amend her complaint to specifically plead allegations of harassment or hostile work environment.[2] We review a trial court's ruling on a party's motion to amend its pleadings for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

The trial court's resolution of plaintiff's motion to clarify or amend her complaint was governed by MCR 2.116(I)(5), the instant motions for summary disposition having been brought under MCR 2.116(C)(10). Under MCR 2.116(I)(5), a court must allow the parties an opportunity to make amendments as provided by MCR 2.118, unless the court determines that an amendment would not be justified. Ordinarily, leave to amend should be freely granted when justice so requires, MCR 2.118(A)(2), but a court may deny a party leave to amend where an amendment would be futile, *Weymers, supra* at 658. Here, the trial court considered plaintiff's suit as if a hostile work environment claim had been pleaded under the PDCRA and the Civil Rights Act (CRA), MCL 37.2101 *et seq*., and after reviewing all evidence before it, found no genuine issue of material fact in regard to either claim.

A prima facie case of hostile work environment requires a plaintiff to prove (1) that the employee belonged to a protected group; (2) that the employee was subject to communication or conduct on the basis of the protected status; (3) that the employee was subject to unwelcome conduct or communication on the basis of the protected status; (4) that the unwelcome conduct or communication was intended to, or in fact did, interfere substantially with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993); *Downey v Charlevoix Co Bd of Rd Comm'rs*, 227 Mich App 621, 629; 576 NW2d 712 (1998).

We agree that plaintiff's proposed amendments would have been futile because there is not sufficient evidence to support a prima facie case of hostile work environment in regard to either a PDCRA or CRA claim. Giving plaintiff the benefit of every reasonable doubt, she cannot prove a "but for" causal connection between her membership in the protected classes and any hostile or unwelcome conduct or communication required by the second and third prongs of a prima facie case. *Downey, supra* at 630.

There is no evidence creating a genuine issue of fact that the termination of plaintiff's employment was a result of defendant's animus toward her disability. Defendant's undisputed evidence suggests that its leave-of-absence policy is enforced without discrimination when an employee exceeds the six-month maximum allowable leave time within a twelve-month period.

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[2] While plaintiff's statement of the issue in her brief on appeal refers to whether an employee may be discriminated against based on an employer's conduct, as opposed to an employer's words, plaintiff's argument within her brief most specifically challenges the trial court's denial of her motion to amend her pleadings. We note that discrimination may, in fact, be established by conduct as opposed to words, but conclude that plaintiff's issue on appeal lacks merit on the basis that the trial court did not abuse its discretion in denying plaintiff's motion to amend her pleadings to raise hostile work environment claims.

Plaintiff also failed to show that her placement on a work improvement plan was a result of defendant's animus toward African-Americans. By all indications, defendant's use of the work improvement plan was proper. Plaintiff's discharge did not result from her failure to make the improvements noted in the plan. Moreover, there is no evidence to establish that plaintiff was instructed that her return to work would not effect her long-term disability benefits or that defendant's managers' January 1997 meeting with plaintiff was motivated by animus toward plaintiff's disability or race. Because plaintiff's proposed amendments would have been futile, *Weymers*, *supra*, the trial court did not abuse its discretion in denying plaintiff's motion to clarify or amend her complaint.

III

Plaintiff's final issue on appeal involves the trial court's handling of her race discrimination claim under the CRA. Plaintiff asserts that the court improperly dissected her allegations and in doing so, dismantled a valid claim which, viewed under the totality of circumstances, was sufficient to preclude summary disposition. We conclude that the trial court properly dismissed plaintiff's race discrimination claim.[3]

Plaintiff's allegations in regard to her claim of racial discrimination include: (1) after she began her leave of absence, her immediate supervisor – the only other African-American where plaintiff worked – applied for and received a promotion within defendant's company, but at another location; (2) plaintiff was then the only minority employed at her particular workplace; (3) plaintiff's new immediate supervisor was a white male; (4) while plaintiff was on leave, her new immediate supervisor placed her on a work improvement plan only a few months after she received a favorable evaluation and pay raise; (5) one of defendant's managers, in a meeting about plaintiff's performance, made a comment about sticking pins into a voodoo doll, plaintiff became upset, and was referred to defendant's employee assistance program; and (6) plaintiff was terminated when she exceeded six months leave of absence and was replaced by non-minority employees.

The CRA prohibits race discrimination in employment decisions, providing:

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status. [MCL 37.2202(1)(a).]

A plaintiff may establish a prima facie case of discrimination under the CRA by showing that she was:

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[3] Plaintiff specified in her first-amended complaint below that her race discrimination claim was based on a disparate impact theory.

> (1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and that (4) others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct. [*Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997), citing *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).]

If the plaintiff establishes a prima facie case, a presumption of discrimination arises that the defendant may rebut by articulating a legitimate, nondiscriminatory reason for the employment decision. *Town, supra* at 695-696. If the employer rebuts the presumption of discrimination, the plaintiff must then raise a triable issue that the stated reason for the adverse employment decision was merely pretext for discriminatory animus. *Id.* at 696-697.

Considering the totality of the circumstances, *Radtke, supra* at 391, we conclude that plaintiff's race discrimination claim fails. There is no evidence indicating the context of defendant's manager's alleged comment regarding "voodoo" and we refuse to find that such a comment constitutes direct evidence of discrimination. In addition, plaintiff has not introduced evidence that all aspects of her employment situation were nearly identical to another employee's situation so as to establish that similarly situated employees were unaffected by defendant's adverse conduct. *Town, supra* at 699-700. Moreover, even assuming that plaintiff could establish a prima facie case of race discrimination, she has failed to present evidence to create an issue of fact as to whether defendant's nondiscriminatory reason for her termination was pretext. Defendant met its burden of presenting a legitimate, nondiscriminatory reason for plaintiff's termination when it asserted that plaintiff was terminated because she exceeded the maximum six-month allowable leave time. *Id*. at 695-696. Plaintiff offered no evidence that defendant enforced its leave policy unfairly on the basis of her race. In fact, defendant produced evidence that the leave policy was enforced uniformly in regard to its employees. Plaintiff also offered no evidence to indicate that she was singled out and placed on a work improvement plan because of her race.

Affirmed.

/s/ Martin M. Doctoroff
/s/ William B. Murphy
/s/ Brian K. Zahra